STATE OF MICHIGAN

COURT OF APPEALS

CINCINNATI INSURANCE COMPANY, Plaintiff/Counter-Defendant-Appellee/Cross-Appellant,	UNPUBLISHED April 21, 2011
v	No. 296280 Oakland Circuit Court
PHILIP F. GRECO TITLE COMPANY, Defendant/Counter-Plaintiff-Appellant/Cross-Appellee.	LC No. 2009-299435-CK

Before: FORT HOOD, P.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

In this commercial insurance dispute, defendant appeals as of right, and plaintiff cross appeals, from the trial court's opinion and order dismissing both plaintiff's complaint and defendant's counter-complaint, with prejudice, as a sanction for the parties' alleged violation of the court rules when filing cross-motions for summary disposition based on stipulated facts. We reverse and remand.

I. FACTS AND PROCEEDINGS

The substantive issue in this case is whether losses sustained by defendant because of unauthorized electronic funds transfers (EFTs) are subject to coverage under a commercial property insurance policy issued by plaintiff to defendant. At a pretrial conference the parties and trial court agreed that the case could be resolved by filing cross-motions for summary disposition, which in turn would be based upon stipulated facts.[1] The parties thereafter submitted the SSFE, agreeing that it was sufficient to allow the trial court to render judgment.

The trial court did not hold argument on the motion, instead opting to issue a written opinion and order. In that opinion the trial court concluded that the material issue was whether EFTs were within the scope of coverage provided by a Forgery or Alteration Coverage Form.

[1] The parties and the trial court refer to the document submitted with the motions as the stipulated set of facts and exhibits (SSFE).

However, the court concluded that plaintiff had improperly cited evidence (a National Law Journal article and a Funds Transfer Fraud Coverage Form) beyond the SSFE, and that the parties' failure to address what it perceived as a necessary issue meant that both parties failed to establish a prima facie case. More specifically, the court held:

> Because the parties' substantive arguments for judgment hinge upon a threshold fact that is not stipulated to or addressed in the SSFE, their substantive arguments - and evidence beyond the SSFE submitted by the Plaintiff - are not properly before the Court and are therefore struck. Even if not struck, the submissions confirm that the success of each party's case rests upon a pivotal fact which was not agreed upon or adequately addressed in the SSFE to enable this Court to enter judgment in either party's favor under MCR 2.116(A)(2) or (I)(2). Consequently, both parties have failed their *prima facie* burden and each party's case is dismissed.

The court further reasoned that

> [t]o consider the EFT issue and related arguments, as well as evidence beyond the SSFE attached by the Plaintiff (e.g., a sample Funds Transfer Fraud [Coverage] Form and related commentary), renders nugatory the intent behind MCR 2.116(A) and otherwise encourages parties to abuse MCR 2.116(A) as a disgraceful refuge to avoid a timely trial. This is a path the Court will not follow.

Accordingly, the court held that dismissal was warranted as a sanction for the parties' violation of the court rules.

II. ANALYSIS

Defendant argues that the trial court erroneously found that the SSFE did not adequately discuss or identify EFTs, and both parties argue that the court erred in dismissing the complaint and counter-complaint as a sanction for its perceived violation of the court rules.[2]

A trial court's exercise of the power to sanction litigants and their counsel "may be disturbed only upon finding that there has been a clear abuse of discretion." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). An abuse of discretion occurs only when the trial court's decision is outside the range of "reasonable and principled outcome[s]." *Id*. An issue involving the construction and application of a court rule is reviewed de novo as a question of law. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000).

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[2] Although plaintiff argues that we should affirm on the ground that the trial court reached the correct result for the wrong reason (an option which, as explained later, we do not take), plaintiff argues on cross appeal that if defendant's counter-complaint is reinstated, its own complaint should also be reinstated because it did nothing to warrant the sanction of dismissal. We agree, and order that to be done on remand. MCR 7.216(7).

The trial court based its decision on three somewhat related grounds. First, it concluded that the SSFE did not contain sufficient facts regarding EFTs, and EFTs were critical to resolving the case. Second, the court concluded that plaintiff expanded the scope of the record by attaching two exhibits to its brief in support of its motion for summary disposition that were not part of the SSFE. Finally, based on its first two findings, the court ruled that all or a part of both briefs had to be struck, and consequently both parties had failed to prove their cases and acted in derogation of the court rules. As a result, the court dismissed both parties' cases with prejudice.

There is no doubt that the parties were entitled to submit this case for a decision pursuant to cross-motions for summary disposition based on stipulated facts.[3] MCR 2.116(A) allows for this specific process:

> (1) The parties to a civil action may submit an agreed-upon stipulation of facts to the court.
>
> (2) If the parties have stipulated to facts sufficient to enable the court to render judgment in the action, the court shall do so.

MCR 2.116(J)(1) addresses how a case should proceed if a motion for summary disposition is denied:

> If a motion under this rule is denied, or if the decision does not dispose of the entire action or grant all the relief demanded, the action must proceed to final judgment. The court may:
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> (a) set the time for further pleadings or amendments required;

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[3] Because the trial court dismissed both plaintiff's complaint and defendant's counter-complaint, we agree with defendant that the dismissal could not have been based on plaintiff's alleged attempt to enlarge the record or on plaintiff raising new arguments beyond the SSFE. Nonetheless, plaintiff's discussion and attachment of a National Law Journal article did not involve an improper attempt to enlarge the SSFE, as the article was used only as secondary authority for plaintiff's legal arguments, not as a source of facts or evidence. Its use therefore does not constitute an expansion of the record. See *In re Schmitt*, 391 Ill App 3d 1010, 1017; 909 NE2d 221 (2009). On the other hand, plaintiff's submission of a sample endorsement that defendant allegedly could have purchased was adding facts or evidence to the record. In its denial letter plaintiff did not mention that there were other, more recent coverage forms available that defendant could have purchased to protect itself against this specific type of loss, and the parties did not identify that as an issue in the SSFE.

> (b) examine the evidence before it and, by questioning the attorneys, ascertain what material facts are without substantial controversy, including the extent to which damages are not disputed; and
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> (c) set the date on which all discovery must be completed.

Although the trial court concluded that it was unable to decide the case based on the parties' stipulated facts and dismissed the entire case, it did not utilize any of these options.

Instead, in dismissing this case the trial court cited MCR 2.504(B)(1) and relied on its inherent authority to sanction litigants and their counsel for violating the court rules or a court order. MCR 2.504(B)(1) provides:

> If a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims.

Under MCR 2.504(B)(3), this involuntary dismissal was a decision on the merits, and was with prejudice.

In imposing sanctions, the trial court was required to comply with the procedures and safeguards set out in the court rules. *Donkers v Kovach*, 277 Mich App 366, 369; 745 NW2d 154 (2007). Dismissal is a sanction so severe that before its imposition there must at least be some *consideration* of relevant criteria. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 631; 750 NW2d 228 (2008). Some non-exhaustive factors developed to date include:

> (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Id*.]

In dismissing the case, the trial court did not discuss or consider any of the *Woods* factors, nor did it articulate any factors other than the purported singular failure to submit an adequate stipulation of facts. The failure to do so warrants reversal. *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995);[4] *Bloemendaal v Town & Country Sports Center, Inc*, 255 Mich App 207, 214; 659 NW2d 684 (2002).[5]

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[4] Interestingly, one Justice has opined that the *Vicencio* factors have no basis in the text of MCR 2.504(B)(1), and therefore should not be placed as qualifications on a trial court's discretion.

Relying upon *Dana Corp v Employment Sec Comm*, 371 Mich 107; 123 NW2d 277 (1963), the trial court was concerned that if it considered the EFT issue when the SSFE was inadequate, it would "encourage parties to abuse MCR 2.116(A) as a disgraceful refuge to avoid a timely trial." Not so, even if we make the unsupported assumption that there was an intent to submit a deficient SSFE in order to delay a trial (an intent that is the exact opposite of the parties actions in trying to resolve this case expeditiously). As the *Dana Corp* opinion makes clear, if a judge is to reject a stipulation of fact as inadequate, it must do so *prior to* its final acceptance, not after:

> To the bench, the bar, and administrative agencies, be it known herefrom that the practice of submission of questions to any adjudicating forum, judicial or quasi-judicial on stipulation of fact, is praiseworthy in proper cases. It eliminates costly and time consuming hearings. It narrows and delineates issues. But once stipulations have been received and approved they are sacrosanct. Neither a hearing officer nor a judge may thereafter alter them. This holding requires no supporting citation. The necessity of the rule is apparent. A party must be able to rest secure on the premise that the stipulated facts and stipulated ultimate conclusionary facts as accepted will be those upon which adjudication is based. Any deviation therefrom results in a denial of due process for the obvious reason that both parties by accepting the stipulation have been foreclosed from making any testimonial or other evidentiary record.
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> *This is not to say, of course, that the hearing officer or judge may not reject any offered stipulation as incomplete or legally erroneous. The concerned adjudicator has not only that right-he has that duty. But as previously indicated, the time so to do is before final acceptance of the stipulation, not after.* [*Id*. at 110-111 (emphasis supplied.)]

Hence, *Dana Corp* specifically allows a trial court to reject a stipulation as incomplete, but the court must do so prior to accepting it. The reason final and accepted stipulations are sacrosanct is to protect the parties, not the court, from an adjudication based on matters outside of, or contradictory to, the stipulations agreed upon. *Id*. Relying upon this aspect of *Dana Corp*, our Court in *Signature Villas LLC v Ann Arbor*, 269 Mich App 694, 706; 714 NW2d 392 (2006) reiterated that trial courts have the discretion to allow additional non-contradictory proofs to

Oram v Oram, 480 Mich 1163, 1164; 746 NW2d 865 (2008) (CORRIGAN, J., concurring in part and dissenting in part).

[5] Had the court analyzed the facts and evaluated the case under *Woods*, it would had to have concluded dismissal was unwarranted. The SSFE did discuss EFTs. Similarly, plaintiff's submission of one additional exhibit did not warrant the drastic sanction of dismissal, especially when defendant does not suggest any prejudice. There is no indication that plaintiff (or, for that matter, defendant) was guilty of willful violations, had a history of noncompliance, or had engaged in a pattern of delay. Further, the trial court did not warn the parties of the perceived deficiencies in the SSFE or afford them an opportunity to cure this error. Lastly, several more appropriate sanctions for these alleged violations were available.

supplement the stipulation. See, also, *In re Logan*, 486 Mich 1050, 1053; 783 NW2d 705 (2010) (MARKMAN, J., concurring in part, dissenting in part) (recognizing that *Dana Corp* allows a court to reject an incomplete stipulation and supplement it by an evidentiary hearing).

Here, once the court determined that the stipulation was insufficient to resolve the matter, and prior to accepting the purportedly incomplete stipulation, the court should have either followed the procedures outlined in MCR 2.116, or taken some other action short of dismissal. The plain language of MCR 2.116(A)(2) contemplates that a situation may arise where the parties' stipulated facts will not be sufficient to enable the court to render a judgment in the action. Under MCR 2.116(I)(3) and (4), a court may order an immediate trial (depending upon what subrule was used), or may postpone resolution of disputed issues of fact until trial. Further, MCR 2.116(J)(1) explicitly provides that if a motion for summary disposition is denied or fails to dispose of the entire case, "the action must proceed to final judgment." The court may also order the parties to file additional or amended pleadings, or may ascertain the matters in dispute by questioning the attorneys. *Id.*[6] One of these routes, or perhaps questioning during oral argument or request for clarification or additional evidence, would have been an appropriate exercise at the court's discretion.

The trial court made much of its discretion under the Constitution and court rules to control its docket, and we fully acknowledge that the "trial court's front-line responsibility for the administration of justice mandates the potential use of sanctions for delay." *North v Dep't of Mental Health*, 427 Mich 659, 661-662; 397 NW2d 793 (1986). We do not question that authority, but simply recognize that in exercising its discretion the trial court must adhere to the court rules applicable to a particular situation, that its decision still must be within the range of principled outcomes, *Maldonado*, 476 Mich at 376, and that the "overriding goal" in litigation is a decision on the merits for the parties, *North*, 427 Mich at 662.[7] Here, for the reasons explained, the trial court's decision was outside that range because dismissing *this* case for submitting *this* incomplete stipulation of fact was not a principled outcome.

Plaintiff's final argument is that even if defendant's counter-complaint was dismissed for improper reasons, the trial court reached the right result because, on the merits, its policy does not provide coverage for defendant's losses arising from the unauthorized EFTs. Because the trial court did not decide this issue, it is unpreserved. *Shuler v Mich Physicians Mut Liability Co*, 260 Mich App 492, 524; 679 NW2d 106 (2004); *Herald Co, Inc v Ann Arbor Pub Sch*, 224 Mich App 266, 278; 568 NW2d 411 (1997). Although this Court may decide an issue that was raised below but not decided by the trial court, *Joe Panian Chevrolet, Inc v Young*, 239 Mich App 227, 233; 608 NW2d 89 (2000), we believe that this issue should initially be determined by the trial

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[6] This option was not utilized by the trial court as it opted to dispense with oral argument despite its misgivings regarding the SSFE.

[7] Indeed, even in *Maldonado* the trial court's dismissal was upheld because it had previously warned the party and her attorney that continued disregard of the court's order would result in dismissal. *Maldonado*, 476 Mich at 376.

court. Accordingly, we decline to address the issue of coverage and remand for further proceedings on that issue.

Reversed and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Michael J. Talbot
/s/ Christopher M. Murray